No. 98-1648

FILED
AUG 19 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DAVID ZWIEBEL
AGUDATH ISRAEL OF AMERICA
84 William Street
New York, NY 10038
(212) 797-7385

NATHAN DIAMENT
INSTITUTE FOR PUBLIC AFFAIRS
UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA
1640 Rhode Island Ave., N.W.
Washington, DC 20036
(202) 857-2770

NATHAN LEWIN
MILLER, CASSIDY, LARROCA
& LEWIN, L.L.P.
2555 M Street, N.W.
Washington, DC 20037-1302
(202) 293-6400

Of Counsel

DENNIS RAPPS
Counsel of Record
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
("COLPA")

135 West 50th Street
New York, NY 10020
(212) 641-8992

Attorney for Amicus Curiae

36 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
INTRODUCTION	5
ARGUMENT	7
I. *Agostini* Repudiated the Principal Justification for the Decision in *Lemon v. Kurtzman*	7
II. *Agostini* Also Rejected the No-Entanglement Justification for the Decision in *Lemon v. Kurtzman*	9
III. Denying Generally Available Government Aid for Secular Programs to Parents Who Enroll Their Children in Religious Schools Violates the First Amendment Obligation of Government Neutrality	11
CONCLUSION	14
APPENDIX	

TABLE OF AUTHORITIES

CASES: **Page(s)**

Agostini v. Felton, 521 U.S. 203 (1997)..... *passim*

Aguilar v. Felton, 473 U.S. 402 (1985) 10

Board of Education v. Allen, 392 U.S. 236 (1968)... 1

Board of Education of Westside Community Schs. v. Mergens, 496 U.S. 226 (1990) 12

Bowen v. Kendrick, 487 U.S. 589 (1998)..... 12

Columbia Union College v. Clark, 119 S. Ct. 2357 (1999) 12

Everson v. Board of Educ. of Ewing, 330 U.S. 1 (1947)..... 11

Jackson v. Benson, 578 N.W. 2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 467, 142 L. Ed. 2d 419 (U.S. 1998) 6

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)..... 6,12

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Meek v. Pittenger, 421 U.S. 349 (1975) 7

Rosenberger v. Rector and Visitors of Univ. of Virginia, 515 U.S. 819 (1995) 11,12

School Dist. of Grand Rapids v. Ball, 473 U.S. 373, (1985)..... 7,8,10

Simmons-Harris v. Goff, 711 N.E. 2d 203 (Ohio 1999) 6

Tilton v. Richardson, 403 U.S. 672 (1971)..... 5,9

Widmar v. Vincent, 454 U.S. 263 (1981) 12

Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986)..... 10

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993)..... 8,10

OTHER AUTHORITIES:

School Voucher Bill Gets Bush Signature, FLA. TIMES-UNION, June 22, 1999, at A1 6

Federal Lawsuit Filed Against Cleveland's Tuition Voucher Program, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, July 20, 1999, *available in* LEXIS, Regional News Library, Ohio News Sources File..... 6

Johnson Drops 12-Year Voucher Phase-In, ALBUQUERQUE J., July 18, 1999, at B5 6

Teacher Union Chief Fights School Choice's Spread Beyond City, NEA Head Fears Vouchers Will Ruin Public Education, MILWAUKEE J. SENTINEL, July 4, 1999, at 1..... 6

NEW YORK STATE EDUCATION DEPARTMENT, NONPUBLIC SCHOOL ENROLLMENT AND STAFF: NEW YORK STATE (University of the State of N.Y., 1998) 3

INTEREST OF THE AMICUS CURIAE[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers and social scientists that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has consistently supported the principle of fair and even-handed treatment for children who attend Jewish and other religious schools. Over the past 31 years, since *Board of Educ. v. Allen*, 392 U.S. 236 (1968), COLPA has filed *amicus* briefs in nearly all of this Court's educational funding cases involving the Religion Clauses of the First Amendment.

COLPA submits this *amicus* brief on behalf of, and is joined by, the following national Orthodox Jewish organizations:

- Agudas Harabonim of the United States and Canada -- The oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America -- The nation's largest grassroots Orthodox Jewish organization, with chapters in numerous Jewish communities throughout the United States and Canada. One of Agudath Israel's functions is to serve as an advocate

---

[1] No party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

for the cause of Jewish schools and Jewish education.

- National Council of Young Israel -- A coordinating body for more than 300 Orthodox synagogue branches in the United States and Israel that is involved in matters of social and legal significance to the Orthodox Jewish community.

- The Rabbinical Alliance of America -- An Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational areas affecting Orthodox Jews.

- The Rabbinical Council of America -- The largest Orthodox Jewish rabbinical organization in the world with a membership that exceeds one thousand rabbis and is deeply involved in issues related to religious freedom.

- Torah Umesorah-National Society for Hebrew Day Schools -- The coordinating body for more than 600 Jewish Day schools across the United States and Canada.

- The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") -- The largest Orthodox Jewish synagogue organization in North America with over one thousand member congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues.

Each of these organizations subscribes to the view that Jewish education is a key, if not *the* key, to Jewish

continuity and survival. The overwhelming majority of these organizations' constituents, as well as an increasing number of Jewish parents who are not affiliated with these organizations, choose to send their children to Jewish elementary and secondary schools. Thus they have a direct stake in the outcome of this case.

The growth of Jewish day schools has been dramatic. In New York State, home to the largest concentration of Jewish families in the United States, State Education Department figures for school year 1980-81 show 215 Jewish elementary and secondary schools servicing some 56,000 students. Ten years later, for school year 1990-91, the number of Jewish schools had grown to 258; the number of students to more than 82,000. For school year 1997-98 (the most recent year for which figures are available), the New York State Education Department counted 308 Jewish schools servicing more than 97,000 students.[2] Similar growth patterns – albeit not as dramatic – have occurred in other parts of the country.

But with growth come growing pains. Many Jewish schools, especially those that service children from low-income backgrounds, struggle mightily to meet skyrocketing budgets. Outstanding teachers leave their jobs because they are paid too little, too late or not at all. School facilities are often inadequate, basic maintenance and repairs unavailable, and books and educational materials in short supply – all for a lack of funds. And while it is heartening that the American Jewish community has committed a greater percentage of its charitable resources to Jewish education, many Jewish schools continue to face serious fiscal problems.

---

[2] NEW YORK STATE EDUCATION DEPARTMENT, NONPUBLIC SCHOOL ENROLLMENT AND STAFF: NEW YORK STATE (University of the State of N.Y., 1998)

These problems frequently result from the dual program of instruction that typifies Jewish elementary and secondary schools across the United States. Each school is, in effect, two schools in one -- a religious studies school, staffed by rabbis and scholars of Jewish learning, whose purpose is to educate students in the traditions of the Jewish religious faith, and a separate secular studies school, staffed by teachers of various faiths, whose purpose is to provide a secular education substantially equivalent to that provided in public and non-denominational private schools. Given this rigorous dual academic track, the cost of education in Jewish day schools is constantly increasing.

The decision of the court below forecloses governmental assistance necessary to help Jewish day schools enter the new century with the modern-day technological equipment and supplies needed to access contemporary sources of learning. This is unfair to parents who conscientiously practice the Jewish faith.

It is precisely because the stakes are so substantial that COLPA and the Orthodox Jewish organizations it represents ask this Court to take this opportunity to re-evaluate the continued vitality of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The ruling in that case barred secular studies teachers in religious schools from receiving any portion of their salaries from governmental sources. As elaborated below, that decision was premised on constitutional assumptions that have since been repudiated in the Court's more recent Establishment Clause jurisprudence. Disavowal of the *Lemon* holding would not only protect the important Chapter 2 program at issue in this case. It would enable schools created by the Jewish community to share equally in secular governmental assistance that is designed to make all Americans of all faiths better informed citizens who can contribute, as they mature, to the welfare of American society and to world progress.

INTRODUCTION

Almost thirty years ago, the Court decided *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which invalidated Rhode Island and Pennsylvania statutes that respectively supplemented and reimbursed salaries paid to teachers of secular subjects in two States' nonpublic elementary and secondary schools. With only Justice White dissenting, the Court concluded that teachers in private religious schools, even if hired only to teach secular subjects, present a "*potential* for impermissible fostering of religion." 403 U.S. at 619 (emphasis added). The Court also held that the First Amendment's Religion Clauses require a State to be "*certain* . . . that subsidized teachers do not inculcate religion." *Id.* (emphasis added). The Rhode Island law was struck down in *Lemon* because the Court "simply recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." 403 U.S. at 618. The Court added, with respect to both state programs, that preventing subsidized teachers from "inculcating religion" will involve governmental authorities in "comprehensive, discriminating, and continuing state surveillance" that would violate the "no entanglement" principle announced in earlier Religion Clause cases. 403 U.S. at 619-624.

This *amicus curiae*, the National Jewish Commission on Law and Public Affairs, filed an *amicus* brief in *Lemon v. Kurtzman* and in its companion case, *Tilton v. Richardson*, 403 U.S. 672 (1971), on behalf of all the major Orthodox Jewish institutions and organizations in the United States, supporting the constitutionality of the Rhode Island and Pennsylvania statutes, as well as the constitutionality of the administration of the Higher Education Facilities Act of 1963 that provided construction grants for the building of projects dedicated to secular educational programs at church-

related colleges. A copy of COLPA's brief in those cases is attached hereto as an Appendix.

The almost three decades that have passed since *Lemon v. Kurtzman* was decided have proved that this Court's 1971 decision was unsound. The need for public financial support for the secular programs of religious elementary and secondary schools has not abated; if anything, it has dramatically increased. The legislative programs that are being endorsed and enacted across the land to achieve the salutary goal of supporting the secular functions of religious schools have varied, and they continue to generate perplexing and contentious constitutional debate. *See e.g., Simmons-Harris v. Goff*, 711 N.E. 2d 203 (Ohio 1999); *Jackson v. Benson*, 578 N.W. 2d 602 (Wis. 1998), *cert. denied*, 119 S. Ct. 467, 142 L. Ed. 2d 419 (U.S. 1998); *School Voucher Bill Gets Bush Signature*, FLA. TIMES-UNION, June 22, 1999, at A1; *Federal Lawsuit Filed Against Cleveland's Tuition Voucher Program*, THE ASSOCIATED PRESS STATE AND LOCAL WIRE, July 20, 1999, *available in* LEXIS, Regional News Library, Ohio News Sources File; *Johnson Drops 12-Year Voucher Phase-In*, ALBUQUERQUE J., July 18, 1999, at B5; *Teacher Union Chief Fights School Choice's Spread Beyond City, NEA Head Fears Vouchers Will Ruin Public Education*, MILWAUKEE J. SENTINEL, July 4, 1999, at 1.

There has been much discussion, in recent years, regarding the "three-pronged" Establishment Clause test articulated in *Lemon v. Kurtzman*, which has been explicitly disapproved by a majority of the Court's current Justices. (See the enumeration in Justice Scalia's concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 398-399 (1993).) The purpose of this *amicus* brief is not, however, to address the "*Lemon* test" or to seek repudiation of that "test." This brief asks the Court to recognize the unsoundness of the actual *holding* of the Court

in *Lemon v. Kurtzman* and to overrule the Court's *result* in the challenge to the Rhode Island and Pennsylvania statutes.

Such a ruling would, we submit, be dispositive of this case. If we are correct and *Lemon v. Kurtzman* is overruled, the form of governmental aid to religious schools challenged in this case would plainly be permissible. If the salary of a teacher of secular subjects in a religious school may constitutionally be reimbursed or supplemented notwithstanding the "potential" that the teacher could stray from secular instruction and indoctrinate his or her students in religious principles, it surely follows, *a fortiori*, that a State or the federal government may constitutionally provide secular nonideological texts or materials to a parochial school with no concern that the books or materials would be "diverted" for religious instruction.

ARGUMENT

I

AGOSTINI REPUDIATED THE PRINCIPAL JUSTIFICATION FOR THE DECISION IN *LEMON V. KURTZMAN*

In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court described in detail the reasoning which a Court majority had utilized in arriving at its holding in *Meek v. Pittenger*, 421 U.S. 349 (1975). The first rationale for the Court's decision in *Meek* was essentially identical to the first reason given by the Court in *Lemon v. Kurtzman* for striking down the Rhode Island Salary Supplement Act -- *i.e.*, that even secular teachers "may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs" (*School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985), quoted in *Agostini*, 521 U.S. at 219) and that this

gives rise to "[the] potential for impermissible fostering of religion" (473 U.S. at 386, quoted in *Agostini* 521 U.S. at 219).

This Court repudiated this rationale in *Agostini*. It said, "[W]e have abandoned the presumption enacted in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." 521 U.S. at 223. The majority in *Agostini* explicitly rejected Justice Souter's limiting interpretation of *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), in which he sought to distinguish between publicly financed employees who "simply translate" and those who might have "an opportunity to inject religious content in what [is] supposed to be secular instruction." 521 U.S. at 224, *discussing*, 521 U.S. at 248.

By a parity of reasoning, the identical rationale of *Lemon v. Kurtzman* -- *i.e.*, that teachers of secular subjects in parochial schools "will inevitably experience great difficulty in remaining religiously neutral" (403 U.S. at 618) -- has been effectively abandoned by the Court and is no longer a viable ground for invalidating a government program aimed at financing the secular education component of education at a religious school. To be sure, the secular teachers whose salaries were supplemented or reimbursed under the laws invalidated in *Lemon v. Kurtzman* were private employees rather than the "public employees" involved in *Agostini*. But the overriding constitutional principle was the same: In both instances, the government financed only secular instruction, and the basis for the constitutional challenge was the apprehension -- or "potential" -- that the teacher who had undertaken to provide only secular instruction might stray into the area of religious indoctrination, thereby resulting in the government financing of religion.

This Court said in *Agostini* that the presumption that secular teachers on the public payroll are "uncontrollable and sometimes very unprofessional" was unjustified. 521 U.S. at 227. The same conclusion applies, we submit, to secular teachers who are paid principally from private funds but who personally undertake -- if their salary is augmented or reimbursed from the public coffers -- to limit their instruction to secular material only. Indeed, the experience in the secular departments of Jewish day schools throughout the country is that they are maintained and operated as entirely separate divisions from the religious studies departments, and their programs of secular instruction are essentially indistinguishable from those of public schools and non-denominational private schools. Our model has been what Justice White, in dissent in *Lemon*, repeated from the district court opinion in the Rhode Island case -- *i.e.*, that "good secular teaching was itself essential for implementing the religious mission of the parochial school." 403 U.S. at 667. In this case, as in *Tilton v. Richardson*, 403 U.S. 672 (1971), the Constitution permits government sponsorship of programs that are "characterized by an atmosphere of academic freedom rather than religious indoctrination." 403 U.S. at 681.

II

AGOSTINI ALSO REJECTED THE NO-ENTANGLEMENT JUSTIFICATION FOR THE DECISION IN *LEMON V. KURTZMAN*

The second rationale provided in *Lemon v. Kurtzman* for striking down the Rhode Island and Pennsylvania statutes was that the process of policing the teachers of secular subjects will inevitably be so intrusive that it will result in

"excessive and enduring entanglement between state and church." 403 U.S. at 619. Justice White correctly observed in dissent that this proposition "creates an insoluble paradox for the State and the parochial schools." 403 U.S. at 668. Teaching religion in a publicly financed secular class of a religious school is, under this reasoning, constitutionally impermissible, but enforcing the assurance that no religion will be taught is itself a reason for invalidating the entire program.

This Court categorically rejected the identical entanglement argument in *Agostini*. It noted that only "excessive" entanglement is constitutionally forbidden, and it subsumed the "no-entanglement" inquiry in the overall appraisal of a statute's effect. 521 U.S. at 232. The Court observed that "[u]nder our current understanding of the Establishment Clause," neither "administrative cooperation" between government officials nor the possibility of "political divisiveness" (discussed in *Lemon*, 403 U.S. 622-624) amounts to "excessive" entanglement. 521 U.S. at 232. And it concluded that when the Court abandoned the assumption that secular teachers would necessarily inculcate religion "simply because they happen to be in a sectarian environment" (521 U.S. at 233), it made *pervasive* monitoring -- the only kind of surveillance that is, by current standards, constitutionally impermissible -- unnecessary.

The Court's opinions in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); and *Agostini*, 521 U.S. 203 (1997), have, therefore, as significantly "undermined the assumptions" (521 U.S. at 206) on which *Lemon v. Kurtzman* was decided as they "undermined the assumptions" of *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and *Aguilar v. Felton*, 473 U.S. 402 (1985). Recent significant changes in constitutional doctrine led to this Court's explicit overruling

of *Ball* and *Aguilar*, and they justify, as well, the explicit overruling of *Lemon v. Kurtzman*.

III

DENYING GENERALLY AVAILABLE GOVERNMENT AID FOR SECULAR PROGRAMS TO PARENTS WHO ENROLL THEIR CHILDREN IN RELIGIOUS SCHOOLS VIOLATES THE FIRST AMENDMENT OBLIGATION OF GOVERNMENT NEUTRALITY

Our *amicus* brief of three decades ago *in Lemon v. Kurtzman* (reproduced in the Appendix) argued that excluding religiously affiliated schools from the class of those whose teachers of secular subjects receive government sponsorship would violate the Free Exercise Clause because it would discriminate against the religiously observant. See Appendix, pp. 9-12. In the intervening thirty years, this Court has developed another constitutional doctrine -- most recently applied in *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) -- that follows essentially the same course and leads to the same result.

The Court noted in its *Rosenberger* opinion that programs providing government financing to education will pass constitutional muster only if they are "neutral . . . towards religion." 515 U.S. at 839. This was the dispositive rule as early as *Everson v. Board of Educ. of Ewing*, 330 U.S. 1 (1947), where the Court warned that "general state law benefits" had to be available equally to all so that no "members of any . . . faith, *because of their faith, or lack of it*," would be excluded "from receiving the benefits of public welfare legislation." 330 U.S. at 16 (emphasis in original). Justice Black said in *Everson* that the First Amendment "requires the state to be neutral in its relations

with groups of religious believers and non-believers; it does not require the state to be their adversary." 330 U.S. at 18.

This Court's *Rosenberger* opinion traced the "neutrality" principle from *Everson* through a series of later decisions of the Court. 515 U.S. at 839-842. The Court held in *Rosenberger* that excluding publications with religious content from the category of those entitled to government subsidies would manifest "pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." 515 U.S. at 846.

By the same token, this constitutional principle -- developed in a series of decisions that were rendered after *Lemon v. Kurtzman* (including principally *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); and *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993)) -- warrants overruling the *holding* in *Lemon v. Kurtzman*. The result reached by the majority in *Lemon* effectively disqualified religious schools -- which have come to be described as "pervasively sectarian"[3] -- from programs of government financing for secular education entirely because they provide religious teaching to their students *in addition to* secular instruction.

Parents who are conscientiously moved to enroll their children in religious schools in order that they may receive intensive religious training are constitutionally entitled to be free of governmental discrimination based on their religious

---

[3] Several Justices of the Court have indicated their disapproval of this classification and deplored its damaging consequences. See Justice Thomas, dissenting from the denial of certiorari in *Columbia Union College v. Clark*, 119 S. Ct. 2357 (1999). Justices Kennedy and Scalia, concurring in *Bowen v. Kendrick*, 487 U.S. 589, 624-625 (1998), expressed a similar view.

beliefs. Yet *Lemon v. Kurtzman* has precisely such a discriminatory effect. It forbids sponsorship of secular teachers in religious schools even though comparable private schools that do not teach religion qualify, under the *Lemon* ruling, for secular teacher reimbursement or salary supplementation. The court below invoked the decisions that followed *Lemon* to deny secular computer technology to the secular programs of religious schools, thereby discriminating against parents and students "because of their faith." This denies to observant Jews, Christians, or Muslims who send their children to parochial schools the benefits of generally available governmentally financed educational programs. The principle of neutrality prohibits that result.

CONCLUSION

For the foregoing reasons, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), should be overruled and the judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

DAVID ZWIEBEL
Agudath Israel of America
84 William Street
New York, NY 10038
(212) 797-7385

NATHAN DIAMENT
Institute For Public Affairs
Union of Orthodox Jewish Congregations of America
1640 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 857-2770

NATHAN LEWIN
Miller, Cassidy, Larroca & Lewin, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037-1302
(202) 293-6400

Of Counsel

DENNIS RAPPS
Counsel of Record
National Jewish Commission on Law and Public Affairs ("COLPA")

135 West 50th Street
New York, NY 10020
(212) 641-8992

Attorney for Amicus Curiae

August 1999

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

No. 153

ELEANOR TAFT TILTON, ET AL., *Appellants*

v.

ELLIOT L. RICHARDSON, ET AL., *Appellees*

On Appeal From the United States District Courts for the Eastern District of Pennsylvania and for the District of Connecticut

---

BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations:

Agudath Harabonim.
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

INTEREST OF THE AMICI CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The organizations named above, which have joined in this brief, are the major national rabbinic and lay Orthodox Jewish representative bodies in the United States. The *amici* are firmly committed to the protection of the constitutional rights of all Americans, and particularly to the preservation of the safeguards of the First Amendment, which are of paramount concern to the adherents of minority faiths in this country. While we staunchly support the principle of governmental noninvolvement in religious affairs mandated by the Establishment Clause of the First Amendment, we view the "absolutist" application of this Clause as a substantial threat to the freedoms guaranteed by the Free Exercise Clause.

The cases now before the Court concern the constitutionality of various forms of financial assistance

BEST AVAILABLE COPY

from tax revenues provided under federal and State laws to private educational institutions, including those which offer religious instruction or which are operated under sectarian or church-related auspices. In each instance, the funds granted or loaned must be used only for non-religious purposes, and they are available to all private institutions meeting defined criteria—whether the institutions be religious or totally secular.

Such financial assistance is of critical importance to the almost 400 Jewish day schools in the United States which, in an age of soaring educational costs, can no longer realistically rely solely on the voluntary contributions of their supporters. The *amici* firmly believe that a program such as those involved here —under which tax revenues subsidize all or a part of the nonreligious curriculum of such schools—equitably distributes the financial burden of the mandatory secular education of *all* students within a State or district among *all* its taxpayers. And to ban such assistance under the guise of maintaining the wall between Church and State is simply to discriminate, in violation of the Free Exercise Clause, against those whose religious convictions require them to provide a rigorous program of religious training for their children.

The interest of the *amici,* therefore, is in highlighting the Free Exercise principles which support legislation of the kind challenged here. We are troubled that those who are actively erecting the Wall Between Church and State seem to be burying under and in it the religious minorities it was designed to protect.

QUESTION PRESENTED

The only issue to which this *amicus* brief is directed is the following:

Whether a State or federal statute providing assistance from tax revenues for the nonreligious facilities or curriculum of private educational institutions violates the First and Fourteenth Amendments because it includes, among those eligible, institutions which also provide sectarian religious education or which are conducted under religious or church-related auspices?

ARGUMENT

Introduction

The Pennsylvania Legislature enacted a statute under which it reimburses certified nonpublic schools for certain actual costs incurred in providing courses in mathematics, modern foreign languages, physical science and physical education. The United States Congress has also enacted a statute under which grants are made to accredited institutions of higher education for the construction of academic facilities other than those to be used for religious services or as any part of a program of religious instruction. The central issue in these cases is whether these legislative measures exceed the limits set by the First and Fourteenth Amendments.

Our argument that they are plainly permissible exercises of the governmental authority over the distribution of tax revenues proceeds from four propositions:

First, neither statute grants any special preference to religious institutions. *All* nonpublic schools, whether denominational or not, are equally eligible.

Second, neither statute provides any direct financial assistance to religious activity of any kind. Both draw a clear and precise line between the financed secular purposes and instruction and the nonsubsidized religious curricula and objectives.

Third, a State or federal statutory scheme which would *exclude* certain nonpublic institutions from eligibility for State aid for secular instruction on account of their church affiliation or the fact that they also provide religious instruction would raise serious questions under the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth.

Fourth, both statutes represent a permissible "neutral course" steered by legislative bodies seeking to reconcile the two Religion Clauses of the First Amendment. In this area, the constitutional principle that there be "play in the joints productive of a benevolent neutrality" (*Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970)) requires that this Court defer to reasonable exercises of the legislative judgment.

I

DISQUALIFICATION OF RELIGIOUSLY AFFILIATED INSTITUTIONS FROM BENEFITS GENERALLY AVAILABLE TO NONPUBLIC SCHOOLS WOULD RAISE SERIOUS QUESTIONS UNDER THE FREE EXERCISE CLAUSE

Just last Term this Court defined the "basic purpose" of the Religion Clauses of the First Amendment—"to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). These cases concern statutory provisions which accomplish precisely that objective—they grant to religiously

affiliated educational institutions the same access to public funds for their nonreligious activities as is enjoyed by nonpublic institutions which serve no religious purpose whatever.

The issue in these cases, starkly put, is whether educational institutions which provide religious instruction or services *in addition* to instruction in secular subjects are constitutionally disqualified by reason of their religious curriculum from enjoying the benefits of a State program which would be freely available to them if they were totally secular in nature. In neither of these cases do the appellants challenge the expenditure of public money for privately operated schools as such; they apparently would approve a statutory scheme under which only private institutions having no religious affiliation would be eligible for assistance from the public treasury. Such a system would, in our view, be fraught with serious constitutional doubts.

This Court recognized in *Board of Education* v. *Allen,* 392 U.S. 236, 247, 248 (1968), "that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and that the private schools—"including parochial systems"—are performing "in addition to their sectarian function, the task of secular education." These plainly true and valid propositions apply to the higher educational institutions involved in *Tilton* v. *Richardson* (No. 153) as well as to the elementary and secondary schools in *Allen* and in *Lemon* v. *Kurtzman* (No. 89).

Would it be constitutionally permissible to deny public assistance to private institutions which carry

out "the task of secular education" because they also have a disparate "sectarian function" if others identically situated are eligible for such assistance because they have no "sectarian function"? Such a disqualification would, we submit, be constitutionally invalid under the principles of this Court's decisions in *Speiser* v. *Randall*, 357 U.S. 513 (1958), and *Torcaso* v. *Watkins,* 367 U.S. 488 (1961).

1. In the *Speiser* case the Court struck down a State statute to the extent that it conditioned the granting of a tax exemption on the suppression of constitutionally protected speech. By denying assistance from the public treasury to institutions which provide secular education solely because they *also* offer religious training, a State would be penalizing religion in the same way as California sought to penalize speech in *Speiser.*

2. The effect of such an exclusion of religiously affiliated institutions would be the converse of *Torcaso* v. *Watkins,* 367 U.S. 488 (1961). It would disqualify from public benefits those institutions or individuals who, by reason of religious belief, deem it essential to provide a comprehensive religious education for their children (or, in the case of the colleges and universities involved in *Tilton,* for themselves) in the same institution and as part of the same school day as is given over to secular training. Obviously, a State statute which explicitly conditioned State aid on an individual's disbelief in thorough and rigorous religious training would be invalid under *Speiser* and *Torcaso;* the statute which appellants in these cases view as constitutionally mandatory is identical in its impact. See also *Sherbert* v. *Verner,* 374 U.S. 398 (1963).

By contrast, the actual statutes challenged here are neutral and nondiscriminatory. They offer no advantage to religious schools or students on account of their religion, and they leave with such institutions and individuals the total financial burden of providing for their religious educations. All they achieve is an equality which is consistent with this Nation's great tradition of voluntarism, and which realistically makes the public purse share in the spiraling costs of secular education.

II

THE MEANS CHOSEN BY THE CONGRESS AND BY THE PENNSYLVANIA LEGISLATURE IN "CHARTING A COURSE" BETWEEN ESTABLISHMENT AND INTERFERENCE WITH FREE EXERCISE OF RELIGION ARE PERMISSIBLE

This Court need not, of course, decide in this case whether it would be constitutionally permissible for the Pennsylvania Legislature or the United States Congress to enact a statute granting benefits to private educational institutions and excluding those which are religiously affiliated. No such questionable line has been drawn in either of the two statutes challenged here. Instead, the responsible legislative bodies have taken precautions to keep tax revenues from assisting religious activities as such, and have made the funds available to institutions without regard to religious affiliation.

In an area where no "absolutely straight line" can be drawn and where, by the very nature of the constitutional principles, there must be "room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970)), the legislative judgment as to how to "traverse the 'tight rope' " (397 U.S. at 672) should be accorded great deference. For, as this Court noted recently in its *Walz* decision, the Establishment and Free Exercise Clauses require an "accommodation" because "either . . ., if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668, 669. In this field, as in the enforcement of the Equal Protection Clause of the Fourteenth Amendment, it suffices, therefore, for this Court "to perceive a basis upon which the Congress [or the State legislature] might resolve the conflict as it did." *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966).

The analogy to enforcement of the Equal Protection Clause is, we submit, borne out by the nature of the danger against which the Establishment Clause protects. For, as the Court observed in *Walz*, the ultimate goal is to avoid "excessive government entanglement with religion" (397 U.S. at 674) while preserving "the autonomy and freedom of religious bodies" (*id.* at 672). The many factors which enter into this accommodation are similar in kind and degree to the "various conflicting considerations" enumerated in *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966). Weighing the degree to which government agencies will become involved in religious affairs under one or another scheme of State financing of secular education is a function for which a court is ill-suited. A legislature, on the other hand, may consider what alternatives are available for the improvement of educational standards and can devise techniques for avoiding the entanglement which the Constitution forbids. It is also in a far better position to weigh the

public need for financial assistance of the kind provided by the challenged statutes and the effect on the welfare of the State and the Nation if it is withheld from religiously affiliated institutions.

There can be no serious doubt, we submit, that there is a basis in fact and reason for choosing the legislative remedies which are challenged in *Lemon* (No. 89) and *Tilton* (No. 153). Each of the statutes achieves the objective of this Court's past decisions dealing with "relationships between public education bodies and church-sponsored schools"—*i.e.*, "to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." 397 U.S. at 669. Hence both statutes are constitutional.

There remains only the claim that the bare allegation in this Court that the statutes have been administered—in violation of their own provisions—to subsidize religious instruction warrants a restraining order or injunction against their future application. That contention is patently unsound. If, in fact, religious instruction is being subsidized and such conduct violates the Constitution or the applicable statutes, the proper remedy is for an aggrieved party to sue to prevent the specific misapplication of federal or State funds. Compare, *e.g.*, *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The burden of proving misuse of the funds in the specific case would then be squarely where it belongs—with the party challenging the expenditure. In the present instance, appellants are seeking to have the courts ban public

expenditures in wholesale fashion on the basis of generalized assertions—vigorously controverted by the appellees—regarding the nature of secular education in religiously affiliated institutions. Such an attempt to shift the burden of proof is as invidious and harmful to constitutionally secured rights as the attempt to shift the burden in *Speiser* v. *Randall*, 357 U.S. 513, 521-526 (1958).

A final word must be said on the pernicious and deplorable assertion made by certain appellants and *amici* that the statutes are constitutionally invalid because they authorize payment from the public treasury to racially segregated schools, and the attendant claim that decisions concerning Southern "tuition-grant" statutes such as *Bush* v. *Orleans Parish School Board*, 365 U.S. 569 (1961); *Poindexter* v. *Louisiana Financial Assistance Commission*, 389 U.S. 571 (1968); and *South Carolina State Board* v. *Brown*, 393 U.S. 222 (1968), control the present case. To even suggest an analogy between the establishment and financing in the South of private "academies" designed for no purpose other than the preservation of racial segregation and the operation and support of Jewish religious schools—which are part of a glorious tradition of learning dating back more than 3,000 years—is highly offensive to these *amici* and to the many American citizens of the Jewish faith whom they represent. The Biblical command incumbent upon each adult male of the Jewish faith "to teach [the religious precepts] diligently unto thy children" (*Deuteronomy*, VI, 7) neither awaited nor depended upon the outcome of *Brown* v. *Board of Education*, 347 U.S. 483 (1954). And the eligibility of the almost 400 Jewish day schools

—established in this country to enable the parents of the approximately 70,000 children now attending them to fulfill this Biblical obligation while affording them a complete secular education—should not, by the same token, turn on the racial distribution of students at the schools. It is plain that neither as to the schools affected here, nor as to the legislative programs which are challenged, can it be said that their "purpose, motive and effect . . . is to unconstitutionally circumvent the requirement first enunciated in *Brown* v. *Board of Education* . . . ." *Brown* v. *South Carolina State Board,* 296 F. Supp. 199 (D.S.C. 1968) *affirmed*, 393 U.S. 222 (1968).[1]

CONCLUSION

In these cases this Court must pass on the validity of legislative measures enacted by responsible representative bodies concerned with the need for improved educational programs and facilities in the United States and in the State of Pennsylvania. The steps taken in the challenged statutes are rational means of improving the quality of education while preserving the separation between government and religion which the Constitution commands. If this Court finds either of these programs impermissible under the First and Fourteenth Amendments, it will be foreclosing not only the specific form of assistance directly affected,

[1] The plain distinction between the racially-motivated establishment of private academies in the South and the religious motivation underlying the creation of the Jewish day schools was spelled out in the brief *amicus curiae* filed by the National Jewish Commission on Law and Public Affairs *in support of the plaintiffs* in *Green* v. *Kennedy*, D.D.C. Civ. No. 1355-69, in which the tax exemption for the Southern private academies was successfully challenged.

but also other experimental efforts to upgrade the level of education in this country.[2]

In another context, Mr. Justice Holmes made the widely quoted observation that the Fourteenth Amendment "does not enact Mr. Herbert Spencer's Social Statics." *Lochner* v. *New York,* 195 U.S. 45, 75 (1905). Nor, we submit, did the Establishment Clause of the First Amendment enact James Garfield's views of nearly a century ago on the use of tax revenues for religiously affiliated schools.[3]

The touchstone of constitutionality must be, as this Court held in *Walz,* whether the measure is a "reasonable and balanced attempt to guard against [the] dangers" sought to be prevented by the Religion Clauses of the First Amendment. 397 U.S. at 673. The measures here challenged plainly qualify by that standard.

[2] In March 1970, for example, under a grant from the United States Office of Economic Opportunity, a report was issued by the Center for the Study of Public Policy at Harvard University recommending a system of "Education Vouchers" for public and private institutions as "a new era of innovation and reform in American schools." Such a program would be impermissible under any of the rationales urged here by the appellants.

[3] Rutledge, J., dissenting in *Everson* v. *Board of Education,* 330 U. S. 1, 61, note 56 (1947), quoted Garfield's 1880 letter accepting the nomination for the presidency:

> "• • • it would be unjust to our people, and dangerous to our institutions, to apply any portion of the revenues of the nation, or of the States, to the support of sectarian schools. The separation of the Church and the State in everything relating to taxation should be absolute."

Accordingly, the judgments in both cases should be affirmed.

Respectfully submitted,

NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
1320 19th Street, N. W., Suite 500
Washington, D. C. 20036
Attorney for
National Jewish Commission
on Law and Public Affairs
119 Nassau Street
New York, New York 10038